

R E P L I E S

F O R

The Right Honourable BASIL WILLIAM DOUGLAS, commonly called *Lord Daer*, Eldest Son of the Right Honourable Dunbar Earl of Selkirk ;

T O T H E

ANSWERS for Colonel ALEXANDER STEWART of Cairn, ANDREW M'DOWALL of Culgroat, Esq. The Honourable KEITH STEWART of Corsewell, and others, Freeholders of the county of Wigton.



1919

JUNE 28. 1791.

REP.—BASIL WILLIAM DOUGLAS,
TO THE
ANS.—Colonel ALEX. STEWART, &c, }

L. HILL. Agent.

H. Clerk.

REPLIES

FOR

The Right Honourable BASIL WILLIAM DOUGLAS, commonly called *Lord Daer*, eldest Son of the Right Honourable Dunbar Earl of Selkirk;

TO THE

ANSWERS for Colonel ALEXANDER STEWART of CAIRN, ANDREW M'DOWALL of Culgroat, Esq. the Honourable KEITH STEWART of Corfewell, and others, Freeholders of the County of Wigton.

THE proper and only question for your Lordships determination in the present cause, is, Whether or not the complainer, possessed of a qualification in other respects perfectly unexceptionable, is entitled to be put upon the roll of freeholders of the county of Wigton, in respect that he is the eldest son of a peer of Scotland. The respondents, however, in their answers, have made
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this only a secondary question ; almost the whole of their paper being taken up in considering their right to be elected to parliament, as representatives for counties. But that is neither the question before your Lordships, nor, if it were, have you any authority or jurisdiction to decide it. If you had any such jurisdiction, the complainer would be very happy to accept of the challenge which the respondents have given him, and meet them upon the question of eligibility. Indeed he has no scruple to confess, that the right of being elected is the one which he wishes chiefly to establish ; and if your Lordships could establish it, he has no doubt, that he could prove before you, even to the conviction of his opponents, that he has that right in common with every other person possessed of the necessary legal qualification. But as this question is beyond your Lordships jurisdiction, the complainer shall not follow the example of the respondents, especially as the discussion of this question would open the field of inquiry and of argument, which would swell this paper to a length, which neither your Lordships time nor the complainer's can afford.

For the same reason, the complainer shall carefully avoid all popular arguments, drawn from considerations of political expediency, which, although they might be urged with propriety and effect to the Legislature, if it were considering what *ought* to be the law upon this subject, the complainer cannot state with propriety to your Lordships, who have only power to declare what the law *is*.

Reserving, therefore, the question of eligibility, till an occasion presents itself for trying it before the proper court, and avoiding, as much as possible, all declamation, the complainer shall now proceed to consider how the law stands with regard to the right of the eldest son of a peer to be admitted upon the roll of freeholders of Scotland.

In considering this question, the complainer does not conceive it to be at all necessary to dwell much upon the original constitution of parliament in Scotland. Your Lordships know well, that originally every person holding lands of the Crown, was bound to attend the King in parliament. Indeed it was a part of his tenure, and extended to all the rest of the King's courts, as well as to parliament : For the King's tenants

nants were in the same manner bound to attend at justice airs, and also at the sheriff's head courts, thrice in the year, and could be fined and outlawed for their absence. Indeed, it was only by the 20th of George II. that freeholders were relieved from this burden, unless when particularly summoned for jurymen, or for some other purpose. In short, the freeholders, or vassals of the Crown, were the *pares curie* of all the King's Courts. Now, that the eldest sons of peers, if they held lands immediately of and under the Crown, were subject to the same burdens and services in these respects, as any other freeholder, is a point which cannot be disputed. We find numberless instances of their sitting in parliament, in virtue of their freeholds, before representation took place. We find them constantly attending the Court of Justiciary, Justice Airs, &c. in the records of which there are instances without number of their sitting as jurymen upon the trials both of peers and commoners. Since the Union indeed, but without any authority whatever, or any reason or pretence, except that of courtesy, it has not been the custom to summon them upon juries. The complainer knows of no instance of the eldest son of a peer sitting as a jurymen since the Union, except the master of Elphinston about nineteen or twenty years ago. But the exemption being founded only in courtesy, the obligation certainly still remains.

Taking it for granted, therefore, that their freehold entitles them to every other privilege, and subjects them to every other burden, to which all other vassals of the Crown are entitled and subjected, it will certainly be not a little extraordinary, if it shall be found, that the eldest sons of peers of Scotland have insensibly, and, it may be said, unwarrantably, crept into an exemption from what was formerly the most important civil service which they owed to the Crown, or have either themselves foolishly and prodigally abandoned, or have been unjustly deprived by their country of what is now considered as the dearest privilege of a British subject. Indeed, if interest and ambition are not taken into consideration, and regard is had only to the preservation of our liberties, and of the constitution, the right to elect is even more important than the right to be elected: For, constitutionally speaking,
it.

it is of little consequence to any man to be elected, if he has a right to choose a person that he thinks qualified to represent him.

Although attendance in parliament was a burden which their tenures imposed upon all the Crown vassals, yet there is good reason to believe, that the vassals were at the same time sensible, that it was a very important and valuable privilege; for, upon every occasion of difficulty or danger, either foreign or domestic, we find that they flocked to parliament in considerable numbers. Their attendance, however, was extremely irregular, and utterly unfit for the purposes of a permanent legislative body. Besides, attendance in parliament, in those days of barbarity, being attended not only with expence, but with many inconveniences, and some danger, it was not to be expected, that the small freeholders would attend at all, unless their service had been rigorously exacted by the Crown. As there could be no concert between them, or general agreement to attend, it necessarily followed, that very few of them attended; by which means, when a few of them did accidentally come to parliament, they were lost and eclipsed by the power and splendor of the nobility and other great barons.

Such was the state of the parliament of Scotland when James I. ascended the throne. A prince of his vigorous abilities must have easily discovered the causes which prevented the attendance of his small vassals in parliament, and his discernment would also very easily discover, that, if he could secure a sufficient attendance of them, it would afford him considerable assistance in breaking the powerful confederacies which the nobility and greater barons were continually forming against the royal authority. Perhaps too, he was partial to the constitution of England, under which he had been educated. But, whatever were his motives, he did endeavour to establish a representation of the small freeholders in parliament, and that too in a manner which would have soon made them of equal power and consequence in the state as the commons of England; for it appears clearly to have been his intention to have separated the commons from the nobility. For this purpose, in the 23d year of his reign, he procured the consent of parliament to the following act:

1427.ch.102. " The King, with consent of the haill counsell, generallie hes statute
" and

“ and ordained, that the small barronnes and free tenentes need not to
 “ cum to parliments nor general counceles ; swa that ef ilk schirefdome
 “ their be send, chosene at the head court of the schireffdome, twa or
 “ maa wise men, after the largenes of the schirefdome, out-tane the
 “ scheriffdomes of Clackmannan and Kinross, of the quhilks ane be
 “ sende of ilk ane of them ; the quhilk fall be called commissares of
 “ the schire ; and be thir commissares of all the schires fall be chosene
 “ ane wise man and expert, called the common speaker of the parlia-
 “ ment, the quhilk fall propone all and findrie [needis and causes per-
 “ teining to the commounes in the parliament or general counsel ;
 “ the quhilks commissaris fall have full and hail power of all the laif
 “ of the schireffdome, under the witnessing of the scheriffis seale, with
 “ the seales of diverse barronnes of the schire, to heare, treat, and fi-
 “ nallie to determine all causes to be proponed in counsel or parlia-
 “ ment ; the quhilks commissares and speakers fall have costage of them
 “ of ilk shire, that awe compeirance in parliament or counsel ; and of
 “ their rents, ilk pound fall be utheris fallow to the contribution of the
 “ said costes, all bishopis, abbottes, priors, dukes, erles, lords of par-
 “ liament, and banrentes, the quhilks the king will be receved and
 “ summond to counsel and parliament, be his special precept.”

It does not appear, however, that this act of parliament ever was
 carried into execution, even in a single instance. Another parliament
 was held in 1431, of which there are two acts in the statute book,
 and another was held in the 1433, of which one act only appears ;
 and none of these afford the least indication that any change had taken
 place in the constitution of parliament. The next parliament was held in
 1434, of which two acts appear, written in Latin ; from the stile of
 the last of which it is evident almost to demonstration, that the small
 barons did not attend, either personally or by representatives, and still
 less that they formed a separate house. This act is in the following
 words : “ Eodem die mensis et anni supradictorum, omnes domini de 1434.ch.136.
 “ parlamento, tam ecclesiastici quam seculares, ac etiam burgorum
 “ commissarij, promiserunt dare literas suas retinentiæ et fidelitatis do-
 “ minæ nostræ reginæ.” In the *first* place, the representatives of the

smaller barons, if there had been any there, would never have been called *domini de parlamento*; and, *secondly*, as the act 1427 expressly directs, that they should be called *commissaries* of the shire, and as that term is here applied to the representatives of the burghs, there can be no doubt, that they would have been described in a similar manner in this act, if they had been present at the making of it.

As it appears therefore, that this act of parliament never was carried into execution, it is of less consequence that it is so exceedingly vague and inexplicit in its terms. It must be confessed, however, that it is abundantly general in its enactment, and that it contains no clause, nor even a word, which can be construed into an exception against the eldest sons of peers; nay, from the last clause of the act, the complainer is entitled to maintain, that they actually were at the time intended to be ranked with the small barons and other freeholders, and as such both to elect and be elected. The last clause very particularly enumerates all those who were still to attend personally, notwithstanding the enactment of the statute. These are, all bishops, abbots, priors, dukes, earls, lords of parliament, and baronets: and certainly not one of this description of persons can apply to the eldest sons of peers; for the complainer imagines, that even the most zealous of his opponents will not contend, that they were Lords of parliament, as the peers were, independent of their freeholds; and therefore, if they formerly sat only in virtue of their freeholds, and not in virtue of the personal privilege of peerage, which by this time was well known in Scotland, then they were undoubtedly entitled to avail themselves of the privilege granted by this statute, of serving by representatives. The king might still have summoned them personally, if he chose it, by special writ, as continued to be the case in England long after representation took place; for the records of the English parliament afford numberless instances of persons being summoned by writ to parliament occasionally, without taking upon themselves or their families the permanent dignity of peerage, although they sat in the House of Lords when they did come. The king might undoubtedly have exercised a similar prerogative in this country; but if he did not summon all or
any

any of the eldest sons of peers personally, then they were undoubtedly entitled to join with the rest of the freeholders in sending a representative.

As this act of parliament never was carried into effect, the complain-er thinks it is sufficient to shew, that it contains nothing that can be construed into an exception against him; and this he thinks he has done to as great certainty as can reasonably be expected from almost any Scots act of parliament. And if he has succeeded in satisfying your Lordships, that this act contains no exception, express or implied, against his right, he thinks it is material in the present argument; because, although this act seems to have been withered in the very bud by the touch of the sceptre, yet still, if it had contained any thing like a disqualification or disfranchise of the eldest sons of peers, that circumstance might have been considered as giving rise to an understanding both among the people and the eldest sons of peers themselves, that any subsequent act establishing representation was not intended to relate to them.

This regulation having been fruitless, the constitution of parliament remained as it was, and the three estates consisted of the Lords Spiritual, the Commissioners of Burghs, and the Barons; which last order, again, consisted of the Lords of parliament, and of such of the great Commoners as chose to attend. These seldom exceeded ten or twelve, and probably were specially summoned by the King, on account of their attachment to him, without being created permanent Lords of parliament.

Certain it is, that from the time the rolls of parliament commence in 1466, so very few persons appear who could with any propriety be ranked in the class of small barons, or free tenants, that when great numbers of them flocked to the convention of estates in 1560, their appearance was considered as a novelty, and they were at first refused admittance. Upon this, they held a meeting by themselves in the church, when they agreed upon a petition and claim of rights to the Lords. This was received with proper respect, and was very deliberately and seriously considered; and after ten days discussion, an act passed unanimously

mously, " That the barons should have free voice in parliament." An account of this transaction was transmitted by Randolph, the English ambassador, to Sir William Cecil, in several letters, which are preserved in the Cottonian library, in which there is also a list of that convention, which is marked on the back, in the hand-writing of Sir William Cecil himself. In this roll, there are no less than five eldest sons of peers; and the members are classed in the following order: Earls, Higher Clergy, Lords, Lower Clergy, Commissioners of Burghs, Peers Eldest Sons and Lesser Barons, without any space betwixt these two last ranks. This proves incontestibly, that the eldest sons of peers at that time were ranked and considered, and took their place in parliament, merely as common freeholders of the crown, although from courtesy they are named first.

The complainer, therefore, imagines, that he has established incontestibly, not only that the act 1427 did not separate them from the class of small barons and common freeholders, but also that in practice they continued for above 130 years afterwards, to be ranked and considered as belonging to that order. Whatever change, therefore, may have happened afterwards, it is clear, that in 1560, they were freeholders, and nothing but freeholders.

In this parliament, there were no less than 101 of the untitled barons and freeholders, although they had seldom before exceeded in number ten or twelve. It appears, however, that it was merely the great and important business of the reformation which occasioned this numerous attendance; for, notwithstanding they had already found by experience how dangerous it is to drop privileges, and how difficult to resume them, yet, from this time, 1560, to 1587, when representation was finally introduced, we do not find in the rolls of parliament the name of a single small baron, either peers eldest sons, or ordinary freeholders.

This shews, in the *first* place, of how very little consequence parliamentary privileges were considered in those days; and, *2dly*, it shews what is of more consequence, how unjust, and how very illogical it is, to argue, from the non-exercise of a right, against the existence of it. A seat in parliament, either personally, or by representation, and consequently

quently the right of voting, continued to be just of as little consequence from the year 1587, down almost to the restoration, as it was during the twenty-seven years preceding the 1587; and therefore it is extremely unfair to argue that the eldest sons of peers did not possess the privileges and rights of the freeholders, because they did not exercise them after the act 1587, when we see how very inattentive they were to their parliamentary privileges, at a time when they confessedly enjoyed them. But upon this subject, the complainer shall enlarge, when he comes to apply himself particularly to the argument which has been raised against him from custom, or rather from disuse.

In the 3^d place, the fact that the eldest sons of peers were considered merely as common freeholders, and sat in parliament as such, and the other fact, that neither they, nor any other freeholder, sat in parliament down from the year 1560 to 1587, establish beyond dispute, that they were at that time, in the understanding of the country, in the understanding of themselves, in the understanding of the king, and in the understanding of parliament itself, in the same rank and situation with ordinary freeholders, subject to the same burdens, and entitled to the same privileges. Parliament, therefore, must have known that any general enactment relating to the small barons, and other free tenants of the crown, whether favourable or unfavourable, would of necessity comprehend and affect the eldest sons of peers, and consequently that every privilege conferred, or burden imposed upon the king's freeholders generally, would become a burden or a privilege to them, unless they were specially excepted by name.

This being the case, your Lordships are now prepared to consider the act 1587 in its proper light; and if, upon considering it, you shall be of opinion, that it not only does not contain any exception against the eldest sons of peers, but is so generally worded, as clearly to comprehend them, you can have no doubt either upon the construction of the act of parliament, or upon the intention of the legislature.

Let us examine, then, this act of parliament, which the complainer must quote at length, because it contains several passages, which, in his apprehension, ought to be decisive of this question. These passages the

complainer shall direct to be printed in Italics, that your Lordships may particularly consider them; and when you have particularly considered this act of parliament, and especially these passages, the complainer is satisfied, that it will be very unnecessary for him to make many re-

1587.ch.113. marks upon it. " Our Sovereine Lord, considering the acts of his hienesse parliament, halden at Linlithgow the tenth day of December, the zeir of God 1585 zeires, makand mention how necessar it is to his heiness and his estaites, to bee trewly informed of the needes and causes pertaining to his loving subjectes in all estaites, especially the commones of the realm; and remembering of ane gude and lovable acte, made by his Hienesse progenitour, King James the first of worthy memory, in the parliament halden at Perth, the 1st day of March the zeir of God 1427 zeirs, anent the commissioners of small barronnes in parliament: That his Majesty and his said estates would ratify and appreeve the same to have full effect, and to be put to execution in time cumming; and of new statute and ordaine, for the mair full explanation of the same acte, and certaine execution thereof, that precepts fuld be directed furth of the Chancellary, to ane baron of ilk shire, first, *To convene the freeholders within the same schire, for chusing of the commissioners, as is contained in the same acte*: Quhilkis commissioners being anes chosen and send to parliament, the precepts of parliament for convening of freeholders to the effect foresaid, to be directed to the last commissioners of ilk schire, quhilkis fall cause cheise twa wise men, being the king's freeholders, resident indwellers of the schire, of gude rent, and weel esteemed, as commissioners of the same schire, to have power, and to be authorised as the act proports, under the commissioner's seale, in place of the schirreff's: And *that all freeholders of the king, under the degree of prelates and lords of parliament, be warned be proclamation, to be present at the choosing of the saids commissioners, and nane to have voit in their election, bot sik as bes fourtie shilling land in free tenendry, balden of the king, and bes their actual dwelling and residence within the same shire*: Quhilk matter being remitted be the said estaites conveyened in the said parliament, at Linlithgow, to the

" will

“ will and good consideration of our said Sovereine Lord, to doe and
 “ ordanetherein as his Hienesse should think maist expedient and requisite
 “ betwixt and his next parliament : And now, his majesty intending,
 “ God willing, to take ordour for the final setting and establishing of
 “ that gude form and ordour maist meet and expedient, to stand in
 “ perpetuity in this behalf, according to the effecte of the said acte of
 “ parliament, maid at Linlithgow, in consideration of the great decay
 “ of the ecclesiastical estaite, and uthers maist necessar and weighty
 “ considerations moving his Hienesse; therefore his majesty now, after
 “ his lawfull and perfete age of 21 zeirs compleit, sittand in plane par-
 “ liament, declaris and decernis the said acte, maid be King James
 “ the first, to take full effect and execution, and ratifies and appreeves
 “ the same be thir presents; and for the bettir execution thereof, *or-*
 “ *dains the commissioners of all the schirreffdomes of this realme, accord-*
 “ *ing to the number prescribed in the said acte of parliament, to be elected*
 “ *by the freeholders foresaid,* at the first head court after Michaelmas
 “ zeirly; or failzing thereof, at any uther time quhen the said free-
 “ holders please conveene to that effect, or that his Majesty fall re-
 “ quire them thereto; quhilkis conventions his Majesty declaris
 “ and decernis to be lawfull. And the saids commissioners being
 “ chofen, as said is, for ilk schirreffdome, their names to be notified
 “ zeirly in writte to the director of the Chancellary be the commis-
 “ sioners of the zeir preceding; and thereafter, quhen ony parliament
 “ or general convention is to be halden, that the said commissioners be
 “ warned at the first, be vertew of precepts furth of the chancellary,
 “ or be his Hienesse missive letters or charges; and in all times there-
 “ after, be precepts of the Chancellary, as fall be directed to the uthir
 “ estaites. *And that all freeholders be taxt for the expences of the com-*
 “ *missioners of the schires passing to parliament or general councelles, and*
 “ *letters of poinding or horning to be direct for payment of the summes*
 “ *taxt to that effect, upon one simple charge of six days warning allenarly:*
 “ And that the said commissioners, authorised with sufficient commis-
 “ siones of the schirreffdome fra quhilk they come, sealed and sub-
 “ scribed

“ derived with six at the least of the barronnes and freeholders thereof,
 “ fall be equal in number with the commissioners of burrows on the
 “ articles, and have vote in parliament and general counsellors, in time
 “ cumming : And that his Majesty’s missives before general counsellors fall
 “ be directed to the saids commissioners, or certain of the maist ewest
 “ of them, as to the commissioners of burrows, in time cumming :
 “ And that the Lords of Council and Session fall zeirly direct letters, at
 “ the instance of the saids commissioners, for conveneing of the free-
 “ holders, to chuse the commissioners for the nixt zeir, and making of
 “ taxation, to the effect above written : *And that the compeirance of the*
 “ *saids commissioners of the schires in parliaments or general counsellors fall*
 “ *relieve the baill remanent small barronnes and freeholders of the shires of*
 “ *their suits and presence aught in the saids parliaments ;* providing always
 “ that the saids small barronnes observe there promises and conditions
 “ maid to his Majesty : Upon the quhilk declaration and ordinance made
 “ and pronounced be our Sovereine Lord sittand in plaine parliament,
 “ as said is, John Murray of Tullibardin askt actis and instruments,
 “ and David Earl of Crawford, Lord Lindsay, for himself, and in
 “ name and behalf of uthers of the nobility protesting in the con-
 “ trair.”

Such is this act of parliament, which may be justly called the *Magna Carta* of Scotland ; for Scotland cannot be said to have had any thing like a constitution before this period ; and any alterations which have taken place since, are merely modifications of this statute, of little consequence, compared to the principal itself. If the eldest sons of peers are not comprehended in this act of parliament, the complainer is at a loss to conceive upon what principle of construction their exclusion can proceed. That the words are general enough to comprehend them cannot be disputed ; and it probably will not now be pretended, that there existed either in practice or in theory, or that either the king or parliament, or either of the parties concerned, eldest sons of peers, or other freeholders, had, by any resolution, declaration, act or deed whatsoever, created, or given occasion to suppose any difference whatever between them

them and other freeholders, which could lead Parliament to imagine, when they passed this act, that the words of it would not comprehend them.

But what shews clearly, not only that they are, but that they were intended at the time to be comprehended under the general enactment of this statute, is this circumstance, that parliament itself seems to have been so well aware of the broad and comprehensive import of the words which they had used, that they foresaw, that even prelates and Lords of parliament, as being also free tenants of the crown, might take occasion from them to claim a right of electing or representing the smaller barons; and therefore they found it necessary to insert the above clause expressly excluding them. Now, certainly, if the enactment of this statute is so comprehensive, that the Legislature was afraid it would extend to Prelates, and Lords of parliament, unless specially excepted, is it possible to conceive that it does not extend to the eldest sons of Lords of parliament, or that the Legislature must not have seen the still greater necessity of excepting them by name, if they were intended to be excepted?

But this is not all; for the Legislature appears to have been sensible, that their enactment was so general, that it would not only have comprehended even the highest of the King's freeholders, but would also have comprehended and given a right of voting to the meanest and poorest vassal possessed of a penny or halfpenny land in Orkney or Shetland; and therefore they found it was necessary to exclude the lowest order of freeholders also, by an express clause, limiting the right of voting to those who were possessed of a 40 s. land,

The complainer does therefore, with some confidence, state it to your Lordships as completely demonstrated, that the two extremes only being excepted, the whole intermediate orders were intended, and must be held to be included under this act.

Perhaps it may be said, that although the eldest sons of peers are undoubtedly comprehended under the enactment of this statute, according to the modern meaning, which is annexed to the words of it, yet that at the time of passing this act, it would be perfectly understood that they were excluded, under the name and designation of Lords of Parliament. But the answer to this is obvious and satisfactory; for if they had been

considered as Lords of parliament, it is impossible to conceive that they would not have exercised their privilege; and, in the next place, we find, that the last time they appeared in parliament at all, they were ranked and classed among the small barons and common freeholders. Many good reasons may be given why the eldest sons of Peers, under the act 1587, did not think it an object of any importance to be elected representatives for counties; and still less to vote as freeholders in the election of others. But if they were considered as Lords of parliament, the wildest imagination cannot conceive a reason why they should not have availed themselves of this privilege. We find that they frequently attended when they had only the rank of common freeholders, and therefore they would certainly have attended when they were raised to the same rank with their fathers, and created, or at least considered to be Lords of Parliament.

The complainer therefore hopes, that he has also demonstrated that they were not virtually excluded under the term of Lords of parliament.

From all this it follows, as the enactment undoubtedly comprehends them, and as they are neither expressly nor virtually excluded, that the eldest sons of Peers of Scotland have right, under the act 1587, to the rights and privileges of other freeholders.

The right of voting continued to be regulated by this act 1587, till after the restoration, when the act 1661, ch. 35. was passed, which the complainer shall also beg leave to quote at length. "The King's Majesty, "
*" considering that diverse debates have formerly occurred concerning the
 " persons who ought and should have a vote in the election of commissioners
 " from the several shires of this kingdom to parliament, and who are capa-
 " ble to be commissioners to parliaments, and that it is necessary for the good
 " of his service, that the same be cleared for the future, doth therefore,
 " with advice and consent of his estates of parliament, statute, enact and
 " declare, That beside all heritors who hold a forty shillings land of the
 " King's Majesty in capite, That also all heritors, liferenters, and wad-
 " setters, holding of the King, and others who held their lands former-
 " ly of the bishops or abbots, and now hold of the King, and whose*
 yearly

“ yearly rent doth amount to ten chalders of victual, or one thousand
 “ pounds, (all feu-duties being deducted) *shall be, and are capable to vote in*
 “ *the election of commissioners of parliaments*, and to be elected commission-
 “ ers to parliaments, *excepting always from this act all noblemen and their*
 “ *vassals*. And it being just, that those who shall be chosen, and accord-
 “ ingly shall attend his Majesty’s and the kingdom’s service in parlia-
 “ ments, have allowance for their charges, his Majesty doth therefore,
 “ with advice foresaid, modify and appoint five pounds Scots of daily
 “ allowance to every commissioner from any shire, including the first
 “ and last days of the parliament, together with eight days for their
 “ coming, and as much for their return from the furthest shire of Caith-
 “ nefs and Sutherland, and proportionably at nearer distances; *and that*
 “ *the whole freeholders, heritors and liferenters holding of the King and*
 “ *Prince*, shall, according to the proportion of their lands and rents ly-
 “ ing within the shire, be liable and obliged in the payment of the said
 “ allowance, *excepting noblemen and their vassals*, for payment of which,
 “ all execution of horning, poinding and quartering is to pass, as for
 “ raising of the exise, and that according as the time and days of the
 “ parliament shall be attested under the clerk of register’s hands. And
 “ because at this time some commissioners of shires have been put to
 “ extraordinary expences in providing of foot-mantles for the riding of
 “ the parliaments, it is hereby statute, that the commissioners shall be re-
 “ lieved of the prices thereof, to be given in under their hands; and that
 “ the prices of the foot-mantles be raised in the same way, and by the
 “ same execution, with the daily allowance afore said, the commissioners
 “ always at the rising of each parliament making the foot-mantles forth-
 “ coming to the shire, to be disposed as they shall think fit.”

Your Lordships will perceive, that this act does in fact refer to the
 former one, and like it confers the right of voting *upon all heritors holding*
a 40 s. land of the King in capite. So far, therefore, the eldest sons of
 peers are still comprehended under this act.

But this act introduces another qualification in favour of persons hold-
 ing lands of the King of the yearly rent of ten chalders of victual, or
 1000 l.; and in this clause the Legislature also uses the general compre-
 hensive

hensive words of *all heritors, liferenters and wadsetters*; and, therefore, it cannot be disputed, that, under this act, the eldest son of a peer, if he possessed this new qualification, was also entitled to vote with the rest of the freeholders.

It may also be observed, that it appears from the preamble of the act, that it was passed for the very purpose of clearing up every doubt with regard to those who had a right to vote in the election of commissioners; and, therefore, as we find no mention made of the eldest sons of peers in this act, it is perfectly evident, that none of the doubts started at that time related to them; and, therefore, this act of parliament leaves their right as complete as ever, just where it was, resting upon the broad and comprehensive terms of this act of parliament, and of the preceding one.

It has been said out of doors, and perhaps may be repeated to your Lordships, that the eldest sons of peers may be also said to be virtually excepted from this act, by the clause directed against *Noblemen and their vassals*. But the complainer confesses, he is astonished to hear such an argument drawn from an act of parliament, which was passed for the very purpose of removing doubts upon the subject; for it is certainly a very extraordinary supposition, that the Legislature, when intending to remove all doubts upon a subject, should, with regard to a very considerable order of men in the state, employ a word which left their right just as doubtful as it was before. In short, before the respondents can be allowed the benefit of this argument, they ought to be able to prove, in the most satisfactory manner, that the word *Noblemen* was, at that time, generally and universally applied to the eldest sons of peers, and that it would be so understood, both by themselves and by the rest of the people; because, as the Legislature is always presumed to talk in technical language, a word which has a known, legal or constitutional meaning, and is properly applicable only to one rank or description of men, cannot be extended to any other, without the strongest possible evidence, that the Legislature did mean it to be used in a vague and extended signification. This being the case, will the respondents be so good as to point out to your Lordships the evidence upon

upon which they pretend to say, that the word *Nobleman* ever was, by the parliament of Scotland, applied to the eldest sons of Peers, because, unless they can do that, they are arguing against every rule that ever was applied to the construction of an act of parliament. That the eldest sons of Peers were not *Noblemen* in the same sense with their fathers, must be admitted, because they did not sit in parliament, in virtue of their nobility ; and as to the foolish reasons that are given by Spottiswood and Forbes, that they were *quasi* Peers, and had precedency, they certainly deserve no other answer than this, that, by the same rule, the youngest sons of Peers may be called *Noblemen*, because they also have precedency, and may eventually succeed to a Peerage. It has also been said by the same learned authors, that they had the privilege of sitting and hearing the debates in parliament ; a strange reason for a man being called a *Nobleman*, and for losing the privileges of a commoner, without acquiring those attached to that order, whose name alone is conferred upon him ! Besides, by the same reason, your Lordships ought to have been called *Noblemen*, and have been deprived of your privileges as electors, because you too had a place assigned you in parliament, even when you were not members of it.

But there is another unfortunate circumstance attending this reason for considering the eldest sons of Peers as *Noblemen* in the sense of this act of parliament, which is, that the privilege of sitting in parliament to hear the debates, was not conferred upon them till a twelvemonth after the passing of this act. If they had such a right before, it was not peculiar to themselves, but was so common, that it was productive of great noise and inconvenience, and was the occasion of passing an unprinted act of parliament in 1662, restricting the privilege of being present at the debates, to the Eldest Sons of Peers, Senators of the College of Justice, the Deputies of the Lord Clerk Register, &c. This paltry privilege, therefore, which, if they ever enjoyed it at all before this act, they seem to have enjoyed in common with every person who could afford a sixpence to bribe the door-keeper, will never be considered by your Lordships as a reason why the Legislature would have called them *Noblemen*, and deprived them of the privileges of other commoners,

without giving them any thing but this vile indulgence in return, as the appendage of their nobility.

May 12. 1662, Having, therefore, shewn negatively, that there is no reason for supposing that the Legislature, in this act 1661, meant to apply the term *Noblemen* to the eldest sons of Peers, the complainer shall now proceed to shew your Lordships, that the term *Noblemen* could not possibly, by this act of parliament, be intended to apply to the eldest sons of Peers. By the unprinted act of parliament above referred to, it is provided, " That none be admitted to stay in parliament, but the *ordinary* members of parliament, viz. the Archbishops and Bishops, *Noblemen*, Officers of State, Commissioners from shires and burghs, and the Clerk Register, deputies, and servants employed by him to serve in the house; and *besides* these, admittance is allowed to the *eldest sons*, and apparent heirs-male of *Noblemen*, to the Senators of the College of Justice, to the Knight Marischall, to the Ushers, to the Lyon, to the Justice Deputes, to the King's agent; one servant allowed to the Chancellor, two to the Constable, two to the Marischall, and one to the Advocate; and it is ordained, that none presume to sit on the benches, save the *Nobility* and Clergy. That the Officers of State sit on the steps of the Throne; that the Commissioners of shires and burghs sit on the forms appointed for them; *that Noblemens eldest sons and heirs* foresaid, sit on the lower benches of the Throne; that the Lords of Session sit at a table which is to stand betwixt the Throne and the Commissioners of burghs."

This act affords the most convincing evidence, that the term *Noblemen*, in the preceding act 1661, means the same with the term *Lords of Parliament*, used in the act 1587, and nothing more. In the *first* place, it is used in that sense in the enumeration of the *ordinary* members of parliament; and, in the *2d* place, the eldest sons of Noblemen are expressly mentioned, in contradistinction to Noblemen themselves; therefore, if there could have remained any doubt with your Lordships, of the meaning of the word *Noblemen* as used by the act 1661, it must now be entirely cleared up by this co-temporary act of parliament, in which you find the term *Noblemen* used as synonymous to

Lords

Lords of parliament, and the *eldest sons of Noblemen* mentioned as altogether a different order.

The complainer, therefore, having proved, that the act 1661, in its enacting clause, does comprehend the eldest sons of Peers, and that they are neither expressly nor virtually excepted by that clause relating to *Noblemen and their vassals*, the complainer thinks he may lay it down as another proposition completely demonstrated, that under the act 1661, as well as under the act 1587, the eldest sons of Peers are entitled to all the privileges competent by this act, to all other freeholders qualified in terms of it.

By these two acts of parliament, your Lordships perceive, that the right and qualification of voting were very accurately ascertained; but it was soon found, that ten chalders of victual, or 1000 l. of rent, was not in the proportion of a 40 s. land of old extent; and, at any rate, that the real rent was always fluctuating. It was also discovered, that great inconveniences arose from the want of a proper roll, or list of those who possessed the qualification required by law. To remedy these inconveniences, the act 1681, ch. 21. was passed, by which the qualification was altered from 1000 l. of real rent, to 400 l. of valued rent: and directions were given for making up rolls of the freeholders in all the counties, and also in what manner any disputes, arising upon the construction of this and former acts of parliament should be settled. The complainer does not think it necessary to quote this act of parliament at length, because, being the law at present in force, it is well known; and besides, it is very long, and contains a variety of clauses which have no reference to the present question. The only clauses to which the complainer thinks it necessary to call your attention are the following: “ *That none shall have vote in the election of Commissioners for shires or stewartries, which have been in use to be represented in parliament and conventions, but those who at that time shall be publicly infeft in property or superiority, and in possession of a forty shilling land of old extent, holden of the King, or Prince, distinct from the feu-duties in feu-lands; or where the said old extent appears not, shall be infeft in lands liable in public burdens for his Majesty’s* ”

" *jeſty's ſupply for 400 l. of valued rent*, whether kirklands now holden
 " of the King, or other lands holding feu, ward or blench of his Ma-
 " jeſty, as King or Prince of Scotland."

The enactment of this ſtatute alſo is perfectly general; for the ex-
 preſſion, that " none ſhall have vote but thoſe who poſſeſs a forty
 " ſhilling land, or 400 l. of valued rent," is juſt the ſame as if the act
 had ſaid, that all thoſe *ſhall* have a vote who *are* poſſeſſed, &c.; and,
 therefore, it muſt be admitted, that the eldeſt ſons of Peers, poſſeſſing
 theſe qualifications, do fall under the enactment of this ſtatute. And
 the enactment, as comprehending them, is ſtrengthened by the act con-
 taining a variety of reſtrictions and exceptions, particularly one relating
 to the objection of minority, without the leaſt mention being made, or
 without any words that can poſſibly imply, that there exiſted any ex-
 ception againſt the eldeſt ſons of Peers.

In ſhort, both the ſpirit and the words of this act of parliament clear-
 ly comprehend the eldeſt ſons of Peers; and as this is the act of parlia-
 ment which at preſent regulates the right of ſtanding upon the roll of
 freeholders, there can be no doubt, that the eldeſt ſons of Peers are en-
 titled, by the *ſtatute* law of the land, to ſtand upon the roll of freehold-
 ers in Scotland.

The only other legiſlative enactment, relating to this queſtion, is a
 claufe in the articles of Union, in the following words: " And alſo de-
 " claring, that none ſhall be capable to elect or be elected to repreſent
 " a ſhire or burgh in the parliament of Great Britain, for this part of
 " the united kingdom, *except ſuch as are now capable, by the laws of this*
 " *kingdom, to elect or to be elected as commissioners for ſhires or burghs to*
 " *the parliament of Scotland.*"

With this claufe the complainer ſhall begin the conſideration of the
 arguments which his oponents have brought againſt his claim.

In the *fiſt* place, your Lordſhips muſt obſerve, that this claufe, taken
 by itſelf, leaves the right of the eldeſt ſons of Peers, in every reſpect,
 juſt where it was, to be determined by the laws of Scotland, as then ex-
 iſting; and therefore the articles of Union, taken by themſelves, neither
 ſtrengthen nor impair their right.

2dly,

zally, The complainer apprehends, that when the history of the circumstances attending the introduction of this clause are considered, it will be found, that the complainer's right is very much strengthened by this clause, although taken by itself it is perfectly indefinite. The proceedings upon this occasion are to be found in Defoe's and Scott's histories of the Union. These are in every body's hands; and therefore need not be quoted at length. The account which they give of this transaction is in substance as follows: When the mode of electing the representatives of counties in Scotland to the parliament of Great Britain was under consideration, a motion was made in express terms, that neither Peers, nor Peer's eldest sons, were capable of electing or of being elected. The first part of this motion, relating to Peers, which at first sight must appear quite superfluous, was occasioned by an idea which some persons had conceived, that the Peers, who were not chosen to represent their own order in the British House of Lords, might be chosen as representatives of counties or burghs to the House of Commons. The second part of the motion, relating to Peers eldest sons, arose probably from two circumstances. In the *first* place, from certain resolutions of the Scotch parliament, with which, as they relate only to the right of being elected, the complainer shall not now trouble your Lordships; and partly from a desire on the part of the Commons, strictly so called, to keep their small share of the representation in the House of Commons of Great Britain wholly to themselves. Accordingly this motion was supported, almost entirely, by the commissioners of shires, the Viscount of Stormont being the only nobleman who voted for it. This motion created violent debates, and was warmly opposed by the whole body of the nobility, who at last proposed to insert the clause above quoted; which was carried by a majority of fourteen. This clause having been also keenly debated, and carried at last only upon a division, cannot be considered as synonymous with the other, or as originating from any compromise between the parties; in which case it would have been either carried unanimously, or by a very great majority.

These circumstances seem naturally to suggest the following conclusions. In the *first* place, that the Commons either did not consider the

eldest sons of Peers incapable of electing and of being elected ; or, at least, they must have considered the question as extremely doubtful ; otherwise there could be no reason for excluding them by name. *2dly*, It is evident that the Commons did not consider a reference to the laws as existing at the time of the Union, as sufficient to exclude the eldest sons of Peers from electing or being elected ; otherwise it would have had the same effect with their own motion, and they could have had no reason to oppose it. In the *third* place, it is evident, that the Peers, upon the other hand, did not consider the laws in existence at the time, as deciding the question against their sons ; otherwise they could have had no reason to oppose the motion of the Commons, and to prefer their own. *4thly*, It follows, that the Peers considered themselves to be gainers by the second motion ; otherwise they could have had no reason for making it, much less for persisting in it with so much earnestness. And, *lastly*, From the conduct of both parties, it is evident that the laws of election existing at the Union were universally considered as favourable to the right of the eldest sons of Peers ; otherwise one party could have had no reason to propose, nor the other party to dread, a reference to their decision.

Therefore, although this article of the Union, taken by itself, does in fact leave the question undecided ; yet the circumstances attending it evidently demonstrate, that it was considered at the time, if not decisive in favour of the eldest sons of Peers, at least as highly favourable to them.

Accordingly the event shews, that it was so considered both by the Peers eldest sons themselves, and by the country at large ; for, at the general election 1708, Lord Johnston, son of the Marquis of Annandale, was returned both for the counties of Dumfries and Linlithgow ; Lord Haddo, son of the Earl of Aberdeen, for the county of Aberdeen ; Lord Strathnaver, son of the Earl of Sutherland, for the county of Sutherland ; and the Master of Sinclair, son of Lord Sinclair, for a district of burghs in Fife. Petitions were presented against them ; and the question was tried upon the petition against Lord Haddo. It is not decent to suppose, that the House of Commons suffered any arguments to influence their judgment,

ment, but those which they believed to be founded upon the law of the land. But it deserves, however, to be mentioned, that the petition of the freeholders of Aberdeen, upon which their judgment proceeded, is filled almost entirely with arguments of supposed expediency, and with vague and nonsensical declamation against the danger which might happen even to the liberties of England, if the Peers of Scotland, through the medium of their eldest sons, were to possess themselves of any share of the representation of the Commons in parliament. Counsel were heard upon this petition, although there is a tradition that no counsel appeared for Lord Haddo; he and the rest of his brethren disdaining to plead in support of a privilege which they held to be incontestible. After hearing the counsel, a motion was made, and the question put, "That the eldest sons of the Peers of Scotland, at the time of the Union, were capable to elect or be elected as commissioners for shires or boroughs to the parliament of Scotland; and therefore, by the treaty of Union, are capable to elect or be elected to represent any shire or borough in Scotland to sit in the House of Commons of Great Britain." It passed in the negative; and new writs were issued in the room of all the persons above mentioned. And from that time to this it has not been discovered, that the eldest son of a Peer has been put upon the roll of Freeholders. Several other instances have occurred, of persons vacating their seats in the British House of Commons on becoming the eldest sons of Peers; but as these relate entirely to the matter of eligibility, which is not before your Lordships, it is unnecessary to refer to them; and the complainer shall confine his consideration to that part only of the resolution against Lord Haddo, which relates to the right of electing.

If the complainer were arguing this question before the House of Commons, he should think it necessary to direct his attention particularly to the consideration of this resolution, because all bodies of men, and none more than the House of Commons, feel some reluctance to retract an opinion which they have deliberately published to the world. But in addressing your Lordships, he considers, that he has very little occasion to trouble himself or you with many words upon
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this subject. The House of Commons undoubtedly are vested, by the constitution, and that for the wisest purposes, with an absolute and uncontrollable jurisdiction in every particular and individual question which comes before them, with regard to the constitution of their own body. If an individual, against whom no objection lies, either on account of personal disqualification, or upon the merits of his election, is returned to them, the House of Commons may vote him out, either as ineligible, or for any other reason, or without any reason at all, or even contrary to all reason; and neither that individual, nor his constituents, can, by the constitution, have any redress. Nay, further, the House of Commons may follow up this rule, or may persist in their iniquity, and may reject this man, or any other man of the same order, as often as he is returned to them; their decision is absolute in each particular question, and the subject has no redress.

In the same manner, in deciding a controverted election, if the House of Commons find that any particular man, or number of men, have no right to vote at that election, their judgment is final. It will determine the merits of that election. The persons rejected have no redress; and the House of Commons may persist in repeating the same decision in every case of a similar nature. But the complainant does positively deny, that a resolution of the House of Commons can create a general disqualification against any body or description of men. The right of electing, or of being elected, is either a part of the common law of the land; or is conferred by statutes, which a resolution of one branch of the legislature only can neither restrict nor extend. The right perhaps may be unavailable; and in practice it undoubtedly must be suspended in its operation, if the House of Commons, from whatever motives, persist in rejecting it. But the right remains at common law. It must be acknowledged by courts of law. They must declare it in every case which comes before them, leaving it to the party himself to make what use of their decision he best can. The right of voting for a member of parliament is but one of many privileges which a freeholder formerly enjoyed, and even still enjoys, in this country, but particularly in England. In England, for example, the freeholders elect

elect the coroners, and have the disposal of other places of considerable emolument, and of great importance in the internal and domestic administration of their counties. If an action, therefore, such as this, were to come before the Court of King's Bench in England, they would not listen for a moment to an argument founded upon a resolution of the House of Commons as declaratory of the law. They would find the complainer entitled to be a freeholder, leaving it to him to exercise his right as he best could; and accordingly a judgment of the Court of King's Bench would put him in possession of every privilege competent to a freeholder, except that of voting; and even with regard to that, the complainer will take it upon him to say, that, although a judgment of the Court of King's Bench would not be binding upon the House of Commons, or oblige them to sustain it, yet it would oblige every returning officer to receive his vote; and if he did not, the Court of King's Bench would either punish the returning officer, or, according to the circumstances of the case, an action of damages would be competent to the freeholder against him.

This the complainer does maintain to be constitutional doctrine; and indeed the case has occurred in England, and was solemnly determined by the House of Lords, in the famous case of Ashby and White in the second and third of Queen Anne. It is true, that that case created great heats in the House of Commons at the time, and that they committed Ashby and others to Newgate, for a breach of their privileges; but execution did pass upon the judgment of the House of Lords in the case of Ashby, and he did recover his damages. A quarrel having ensued between the two Houses upon this matter, the Queen prorogued the parliament, and the prisoners were liberated of course. The Commons did not prosecute the matter of new; and the complainer shall say no more upon the subject, than that the proceedings of the House of Commons in that case have ever since been considered as illegal and unwarrantable, and the precedent has been since abandoned and reversed even by themselves: For, in the noted case of Wilkes, when it was proposed to censure the sheriffs of Middlesex, for repeatedly returning him, after the House of Commons had declared him to be ineligible, that idea was reprobated; and it was universally agreed,

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that the sheriffs had done their duty. If it is admitted, therefore, that a declaration of the House of Commons cannot authorise a returning officer to reject a candidate whom they have declared to be ineligible, it follows, *a fortiore*, that a resolution of the House of Commons alone cannot authorise a returning officer to reject the vote of an elector. But if a resolution of the House of Commons cannot operate as a disqualification even against an individual, beyond the case and time for which that resolution was passed, still less can such a resolution create a general disqualification against a whole body of men.

But if there could be any doubt upon the law, as established by the House of Lords in the case of Ashby and White, and acknowledged by the Commons themselves in the case of Wilkes, it is entirely removed by the last amendment that was made to Mr. Grenville's act for the trial of controverted elections. So far from the resolutions of the House of Commons alone giving law to courts of justice in matters of qualification, they were not binding even on themselves. For even after their jurisdiction in this respect was purified, and regenerated by the passing of Mr. Grenville's act, a resolution of the House of Commons, or, what is the same thing, of a committee of Election, did not fix the right of election in any place; and subsequent committees, upon future occasions, were at liberty to find, and sometimes did find, the right of election to be totally different. To prevent, therefore, the possibility of the many inconveniences, to say nothing of the injustice, of such discretionary and arbitrary power in the House of Commons and their committees, an act was passed within these few years, declaring, that the resolution of a committee with regard to the right of election in any particular case, should become final, if not petitioned against within a limited time. This regulation concerns only the right of election in burghs; but the principle is the same: and since the House of Commons themselves found it necessary to have an act of parliament, to give effect to a resolution of theirs regarding the qualification of any body or description of men, the conclusion is inevitable, that even they themselves considered and admitted, that, according to the known law of the land, a
resolution

resolution of the House of Commons cannot create a general disqualification.

From all this, therefore, the complainer humbly contends, that it follows in sound constitutional doctrine, in the *first* place, That the resolution of the House of Commons 1708 cannot create a disqualification against him, if it did not exist before. And *2dly*, That it cannot even be considered as declaratory of the law, even if the acts of Parliament could be considered as of dubious construction. In short, it can be considered in no light, but as a decision of a court incompetent to the question, as having no power to determine beyond the particular cases which happened to be before them.

Considered even in that light, this authority, small as it is, sinks almost to nothing, when it is considered, that there is every reason to believe, that it was pronounced after hearing only one side of the question: That it was pronounced in the face of the declared opinion of the people of Scotland at the time, manifested by their returning no less than four Peers eldest sons, for five places, to one parliament: That it was pronounced in the face of the proceedings of the parliament of Scotland immediately before, which must have been well known to them, and which certainly amount to every thing but an express acknowledgment of the right in question: And, *lastly*, That it was pronounced by persons who could have but a very imperfect knowledge of the subject.

This decision, therefore, if it can be called one, being set aside, the question returns for your Lordships determination, upon the construction of the acts of parliament relating to the right of election; and therefore the complainer shall proceed to consider the only other argument which can possibly prevent your Lordships from giving them the only interpretation which their words and spirit can authorise.

This circumstance is, the length of time which has elapsed since the act 1587, without any exercise of the right which is now claimed by the eldest sons of Peers. And this argument has been urged in two points of view. In the *first* place, it has been said without doors, that supposing the act 1587 not to be very clear upon the subject; yet the circumstance of

no eldest son of a Peer claiming the privilege of a freeholder since that period, must be considered as marking the understanding both of themselves and of the nation, with regard to the intendment of this act of parliament, and consequently affording the best explanation of it which can now be obtained.

And, *2dly*, It has been said, whether it was or was not so understood at the time, that, having never *de facto* exercised this right, they have now lost it by disuse.

The complainer has already taken notice of these two arguments incidentally in his remarks on the act 1587, and the state and constitution of Parliament at that time. He must be forgiven, however, for enlarging on this branch of the argument; because, although he considers it in point of law to be at best but plausible, he confesses he has found it to be that argument, of which, without doors, he has found it most difficult to convince the people of the fallacy and injustice.

The two branches of this argument above stated, arising from the non-exercise of the right, are certainly in some degree distinct from each other; at the same time, however, they are in many respects so intimately blended, that the complainer imagines it will save a great deal of repetition, and produce more connection in his argument, to consider them both together, and to state his reasons upon the subject, as they naturally arise out of one another. In doing this, he is sensible, that he need not caution your Lordships against the vulgar error which has crept into the consideration of this question, of confounding the doctrines of prescription and of custom; for your Lordships well know the difference between the two, and that the rules and principles of prescription are entirely foreign from the present question. The petitioner shall confine himself therefore entirely to the doctrine of custom and disuse.

The petitioner has no occasion to dispute, that it is a maxim of the law of Scotland, that custom can make and unmake law, and that even acts of parliament may be abrogated by disuse; for the law of Scotland, in considering what is law, looks always to the will of the legislature, that is, to the consent of the King and of the people; and it holds

holds, whether justly or unjustly is nothing to the purpose, that the consent of the King and the people may be collected from their tacit acquiescence during a long course of years in any custom, as much as if they had expressly declared it to be law. In the same manner, if the King and people have formally enacted any regulation by an act of the legislature, the law considers a tacit connivance at the breach of it for a long course of time, as evidence that the King and people have consented to repeal it.

The petitioner admits the effect of immemorial custom in making and unmaking laws, to the fullest extent to which his opponents can desire to plead it, *in matters of private right*, because in such matters it cannot possibly be productive of disadvantage either to individuals or to the public. It can be of no injury to individuals, because a custom will never be acknowledged as law by your Lordships, till it has been of such continuance, and has become of such notoriety, that it must be well known to the people. It cannot be of disadvantage to the public, because the public is very little interested in the transmission and regulation of private rights, the whole system of which may be different in two countries, as they are in England and in Scotland, and yet the rights of the people be nearly the same, and equally secure. Nay, if it were possible to suppose the case, the municipal laws of the two kingdoms might be mutually exchanged, provided it were done gradually and insensibly by the operation of custom, without the smallest injury to the public rights and liberties of either people.

But in the matter of public rights and privileges, it is not so with them; they never can be altered, either by custom or statute, without materially affecting both individuals and the public. If public rights are altered by *statute*, there is less danger, because the legislature must be supposed to have considered the subject, and to have weighed both the possible advantages and disadvantages of the proposed regulation. If a new right of a public nature is conferred by the legislature, they must be supposed to be convinced that it will be attended with advantage to the individual, and be of no detriment to the public. On the other hand, if the legislature takes away a public right, we must suppose them to be convinced that the advantages which the right brought to the in-

dividuals who enjoyed it, were immaterial, compared with the mischiefs which it produced to the constitution.

But with regard to custom, the case is different. Custom does not print its laws annually, or proclaim them by heralds. Custom speaks but in a whisper, and steals upon us with slow and silent steps. Its progress is unknown; and its different stages are never perceived, till it has completed its journey. In short, in the matter of custom, we are sometimes surprised by the law before we are sensible of its existence; nor is there an opportunity to examine its principles before it is too late to resist it. A thousand inconveniencies may be found to attend it, which, if the matter had been regularly debated when the custom first began, would probably have been foreseen by the legislature, and would have prevented them from giving that consent which custom presumes.

In all governments there are many principles and privileges which are of much more importance than even the possessors of them sometimes imagine; the continuance or loss of which may lead to consequences in government, both to the public and to individuals, which at first sight may not be easily perceived. It is therefore highly expedient, in general (for every rule has exceptions), that no public right should be lost or acquired in any government, without a thorough and deliberate discussion of the consequences which may result from the innovation.

If custom, in the acquisition or loss of public rights, be a doctrine of so very dangerous a tendency in any government, it certainly deserves to be adopted with peculiar caution in the British constitution, the parts of which are so nicely and curiously constructed, that the smallest alteration may in time destroy the balance which regulates the whole. Accordingly, the British legislature seems to be well aware of this danger; for it is astonishing with what caution it adopts even statutory innovations, for fear of the consequences, which, even after the most mature deliberation, they may be unable to foresee. If, therefore, the whole course of our history informs us, how very cautiously the legislature gives its express consent even after the most mature deliberation, to any change in matters of public right, certainly courts of law ought to be
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extremely cautious of inferring the consent of the legislature to any alteration in a public right, originally belonging to a body of men by the ancient common law of the land, merely from the existence of a custom, the consequences of which, from the very nature of the thing, could never have been foreseen by the legislature.

The petitioner may push this argument into practice, and contend, that custom, particularly negative custom or disuse, does not apply, by the law of Scotland, to matters of public right ; at least, so all our lawyers maintain.

Lord Stair, who wrote at a period of great importance in the consideration of this question, after saying, that, like the English, “ We are Stair, B. I. tit. i. § 16. ruled in the first place by our ancient and immemorial customs, “ which may be called our common law,” mentions, in the next place, “ *our statutes or our acts of parliament, which in this are inferior to our* “ *ancient law, that they are liable to disuse, which never encroaches on* “ *the other.*” And certainly, if there be any one part of our common and ancient law better known, more fundamental, and more closely interwoven with the constitution of Scotland than another, it is this, that every free tenant of the Crown was originally obliged, and is still entitled to serve in parliament ; subject always to such modifications and restrictions, by representation or otherwise, as Parliament itself has created. Except, therefore, in so far as this right has been altered and modified by parliament, this burden or service, to which modern ideas annex the name of privilege, remains a part of our ancient law, on which, in the language of Lord Stair, *disuse never encroaches*. Since, therefore, it has been shewn that parliament has not encroached upon this burden or right, since the nature of it was altered by the act 1587 into a system of representation, in so far as the eldest sons of Peers are concerned, it lies between your Lordships and Lord Stair, to determine whether disuse can.

The doctrine laid down by Mr. Erskine upon this subject, upon the whole, coincides with that of Lord Stair. “ Hence also, a posterior Ersk. B. I. tit. i. § 45. custom may repeal or derogate from a prior statute, even though that “ prior statute should contain a clause forbidding all usages that might “ tend.

“ tend to weaken it ; for the contrary immemorial custom sufficiently
 “ presumes the will of the community to alter the law in all its clauses,
 “ and particularly in that which was intended to secure it against altera-
 “ tion ; and this presumed will of the people operates as strongly as
 “ their express declaration. *No statute can, however, be repealed by mere*
 “ *non-usage or neglect of the law, though for the greatest length of time ;*
 “ *for non-usage is but a negative, which cannot constitute custom ;* there
 “ must be some positive act that may discover the intention of the com-
 “ munity to repeal it. Where the usage contrary to a statute hath not
 “ yet acquired strength enough to abrogate it, the King and Council
 “ may, by proclamation, prohibit the farther observance of such usage,
 “ and thereby restore the statute to its first vigour. This power in
 “ custom to derogate from prior statutes, has been confined by most
 “ writers to those concerning private right ; and it hath been adjudged,
 “ once and again, that laws which regard the public policy, cannot fall
 “ into disuse by the longest contrary usage, January 27th 1681, Jack ;
 “ February 1729, Smollet. But the last of these decisions, by which
 “ the election of a provost had been set aside, because he did not reside
 “ in the borough, according to the direction of our old statutes, was
 “ reversed upon appeal, February 19. 1730 ; and it now appears to be
 “ the opinion of our Supreme Court, that public laws, concerning the
 “ election of magistrates and counsellors of boroughs, may fall into dis-
 “ use, and that the sets of the several boroughs, established and confirm-
 “ ed by the general convention of boroughs, ought to be the rule in
 “ determining such questions, unless where the sets are altered by a
 “ contrary immemorial custom.”

What Mr Erskine says, in the latter part of this paragraph, is not
 very intelligible. At any rate, the decision of the House of Lords, which
 he there quotes, can hardly be considered as contradictory of the general
 doctrine laid down by himself and Lord Stair, that custom and disuse
 are not applicable in the matter of public rights. In the *first* place, It
 relates certainly to what hardly deserves the name of a public right, the
 mere residence or non-residence of a provost in his borough ; and, *2dly*, It
 seems to have proceeded upon what may be almost considered as equi-
 valent

valent to a statute, an act of convention of the royal boroughs regulating their own internal policy. We may, therefore, take his general position as remaining still uncontradicted, that, *in a matter of public right, "no statute can be repealed by mere non-usage or neglect of the law, though for the greatest length of time; for non-usage is but a negative, which cannot constitute custom."* Now, if a public statute cannot be repealed by disuse, still less can any branch of the common and ancient law of the land; for the one is fundamental and radical in the constitution, the other only ingrafted upon it.

It may be of some consequence to consider the reason which Mr. Erskine gives for this, *that non-usage is but a negative, which cannot constitute custom*, that is, in other words, to consider the difference between custom and disuse; and your Lordships will perceive, that there is much reason for giving stronger effects to the one than to the other. By *custom*, in opposition to an existing law, the people are active; they are supposed to be always doing something, which the Legislature may perceive, and which, therefore, they may prohibit, if they disapprove of it; and the people are acquiring rights and immunities, which is always favourable. In *disuse*, in opposition to an existing law, the people are passive,—they are silent,—nothing happens to awaken the attention of the Legislature,—and the loss of rights and immunities is always unfavourable. The exercise of a right is always a matter merely of choice, a *res meræ facultatis*, as the law expresses it; and the non-exercise of a right, in almost every case, may arise from a variety of considerations other than an intention of abandoning it. For example, in the case of eligibility to parliament, if the Legislature should see a man come among them, of an order of men who had never sat in the House before, as was the case of Mr. Woolaston a clergyman, who took his seat in the House of Commons of England, in the end of last century, the attention of the Legislature must be immediately roused, and an opportunity is given them to deliberate, whether such person is or is not capable of being elected; and, therefore, if they permit persons of this new description to sit among them for any length of time, the Legislature may be fairly presumed to consent to the privilege.

But if we suppose, that, by some strange fatality, not one eldest son of a Peer should be returned to the next parliament of Great Britain, or for twenty parliaments to come, can it be imagined, that the House of Commons, or any other branch of the Legislature, would take any notice of this; that they would institute an inquiry into the cause of their absence; or that they would pass any law declaratory of their right to sit whenever they have an opportunity of claiming it? Undoubtedly not: Parliament would take no notice of their absence, justly considering, that as the constitution gives them a capacity to be elected, they would exercise that privilege again, whenever an opportunity presented itself, or their interest prompted them.

In this supposed case, what construction could be put upon the silence of the Legislature, or what one proposition is there in nature, to which the consent of the Legislature can be presumed? The eldest sons of Peers in England certainly have a right to stand candidates or not as they please; and if they do stand candidates, the people of England have a right to elect them or not as they please; therefore, the Legislature could be supposed to consent only to this, that the eldest sons of Peers may or may not be candidates, and that the people may or may not elect them.

This leads the petitioner to the consideration of two other circumstances, which naturally present themselves in this stage of the argument. It has already been said, that the exercise of any privilege is *res merae facultatis*; but the privilege of being on the roll of freeholders is more. It is a *res alienae facultatis*; it depends very much upon the will of others, and it is not so easy to conceive how a person can lose a privilege, the exercise of which is not perfectly in his own power. This being the case, before disuse, if it were applicable at all, could apply to the present question, it seems to the petitioner to be necessary for his opponents to shew, not only that no Peer's eldest son ever acted as a freeholder, but also, that no Peer's son ever attempted to act; for, as the full completion of the privilege does not depend solely upon themselves, it is enough for them, in order to preserve their privilege, to do every thing on their part to exercise it. If it shall be said that it is impossible

possible to prove this from any record, and that at any rate it is not necessary to prove a negative, then the petitioner answers, if the want of records are objected, that there were no rolls of freeholders during a very considerable part of the period which is said to constitute this dis-
 fuetude against them; and therefore, if he has shewn, which he hopes he has done, that by the law of the land, both common and statutory, Peers eldest sons were, and are entitled to the rights and privileges of freeholders, then, by every rule of construction, he is entitled to pre-
 sume, that they did act on every occasion during all the period prior to the act 1681, ordering rolls of the freeholders to be kept, because the petitioner lays it down as a maxim, which is not capable of being dis-
 puted, that every man and order of men are presumed to be in the ac-
 tual exercise of their rights, in all cases, and upon all occasions, where the contrary cannot be shewn. The petitioner apprehends this to be both legal and constitutional doctrine.

The effect given to dis-
 fuetude in matters of public right by our law, cannot possibly be better illustrated, than by a case which actually oc-
 curs in the annals of parliament, and which has been already mention-
 ed with another view.

The petitioner refers to what happened in 1560, when the small
 barons came to parliament in great numbers. Their appearance, how-
 ever, was such a novelty, that at first a doubt was started whether their
 right to attend in any shape had not been lost by disuse. The small
 barons and freeholders appear to have behaved with great temper and
 judgment. They immediately met by themselves in the church, "*in*
 "*very honest and quiet sort,*" as Randolph expresses it in a letter to Sir
 William Cecil, and drew up a petition to the Lords and greater Barons,
 then sitting, requiring to be restored to their privilege of sitting in par-
 liament, and referring expressly to the ancient constitution and acts of
 parliament as their charter. Their petition was received with the respect
 which was due to it, and the matter was fully canvassed upon both sides.
 It was unanimously resolved, as formerly mentioned, "That the barons,
 "according to an old act of parliament, made in the time of James I.
 "in the year of God 1427, shall have free voice in parliament." It is

no doubt true, that this parliament was not called by royal authority, and therefore its acts and records have not been preserved ; but these proceedings are sufficient to prove the sense which was then entertained of the effect of disfluence on public rights, in opposition to the ancient common, or statutory law of the land. Besides, their right to sit in parliament, notwithstanding their long disfluence, is sufficiently established by the act 1587, introducing representation ; and, therefore, if the authority of the convention in 1560, should be objected to, it is only adding 27 years more to the long disfluence which had already taken place, when we find their right recognised and established by an act of the Legislature.

But, what beyond every thing shews both the danger and the absurdity of pleading the disuse of a privilege, during a period when the exercise of it was considered either as not valuable, or as not necessary, against the resumption of it at a future period, when its value and importance come to be understood, is this circumstance, that after they had accomplished the great event of the reformation in the parliament 1560, the lesser barons and freeholders, including the eldest sons of Peers, returned to their homes ; and for 27 years they do not appear in any one instance to have exercised this privilege which they had lately found it so difficult to regain ; and if it had not been for the act 1587, establishing representation, in all probability we should not have found one of them attending again till some moment of difficulty and danger roused them into action.

It appears then, that under the old constitution of parliament, when every freeholder had a right and was obliged to attend personally, that the lesser barons had in a manner neglected to attend parliament for a century and a half, but that whenever they thought proper to resume their right, it was immediately recognised. The act 1587, introduced a new constitution ; but unless it had been fixed by that act itself, there is no principle in law or in reason why disfluence should operate against a public right competent under this new constitution, more than under the old. The principle is the same ; and if it had been adopted by the parliament in 1560, in all probability, by this time we should have had

no constitution at all : For if it had been once determined, that the lesser barons and freeholders had lost their right to sit in parliament, there is little probability that it ever would have been restored to them, either personally or by representation.

This example no doubt relates to the privilege of sitting in parliament ; but there being no representation, and consequently no right of election, the whole, or at least the great privileges of a freeholder, did then consist of this right of sitting in parliament in person, and, therefore, this example sufficiently shews the understanding of parliament at the time, with regard to the permanency of public rights, and that it has always been a part of the law and constitution of Scotland, that they could not be lost by disuse.

The complainer shall only take the liberty of adding one single observation, and then he shall conclude. It has been said, that the total disappearance of the eldest sons of Peers from parliament, after the passing the act 1587, must be considered as the most convincing argument, that it must have been the universal understanding of the country, that that act was intended to exclude them. But the complainer humbly imagines, that this argument will not bear examination. If the eldest sons of Peers had been found upon the rolls of parliament, down to the very passing of this act, and if they had suddenly and abruptly disappeared from that moment, then there might be reason to conclude, that there was some meaning or construction of that act of parliament, although not discoverable now, which at the time however was considered as sufficient to exclude them. But the fact is, that no Peers eldest son, nor small baron of any description whatever, is to be found upon the rolls of parliament, after the memorable one of 1560; and consequently it is impossible to connect their disappearance from parliament with the act 1587.

In short, the fair presumption is, if they never did exercise their privilege as freeholders after the act 1587, that it was not owing to their having either abandoned it, or to their having been virtually deprived of it by the act 1587, but to the circumstances of the times, and the melancholy situation of this country, which, from the time of passing the

act 1587, down to the revolution, did not permit a seat in parliament, or the privilege of an elector to be of consequence to any man, whether considered as an object of ambition, of patriotism, or of interest. The state of Scotland, from the accession of James VI. to the throne of England, down to the Revolution, or even down to the Union, was perhaps the most wretched and deplorable that is to be found in the annals of mankind. Scotland, during this period, furnishes perhaps the only example of a nation, which having made some progress in civilization, remained for above a hundred years absolutely stationary, if it did not actually recede. Its political situation in particular was such, that it was impossible that a seat in parliament could be considered as an object to any man, who could possibly gratify either his pride, his indolence, or his activity, in any other situation. The nobility had already so much weight in parliament, both by their own numbers and by their influence in counties, and particularly in burghs, that it could be no object to them to procure a paltry and unimportant increase to that influence, by bringing a few of their eldest sons into the House. On the contrary, their aristocratic pride and exorbitant weight in the constitution, was, and must have been so odious to the rest of the people, that it would have been extreme folly in them to have increased that odium, and perhaps exasperated the nation by introducing their eldest sons into parliament, and thereby depriving the Commons of even the appearance of independence and consequence in the Legislature.

On the other hand, the Commons, crushed by the weight of a numerous nobility, at once turbulent and servile, barbarous in their manners, and yet corrupt in their principles, and steady and consistent only in the oppression which they exercised over their inferiors, could have no possible motive to increase the weight of the aristocracy, already too powerful, by inviting or encouraging the eldest sons of Peers to participate in their privileges. And, 3^{dly}, The Peers eldest sons themselves, who were as proud as their fathers, and looked forward only to the rank they were to enjoy, would never think of mixing with a set of men, whom, although in fact their equals, they despised as their inferiors. In such circumstances, therefore, it is certainly not surprising that they

they should never have exercised or claimed a privilege, which must have degraded them in their own opinion, without any compensation to their pride, either from interest or ambition.

In short, when it is considered that a seat in parliament, and consequently the right of voting, was of so little consequence, even down to the Union, that the members, both of counties and burghs were paid a salary by their constituents; when it is considered, that it was the standing law of the land, that none but actual merchants or traffickers within burgh could represent the burghs; that this act was enforced in the case of North Berwick so lately as about the time of the Revolution; and that, to the very last existence of the Scotch parliament, one half of the burghs continued to be so represented; does it require the prohibition of either law or custom to account for the *heir-apparent* pride of the old Scots nobility never exercising a privilege which undoubtedly belonged to them, but of which the exercise was in itself invaluable, and by them would be considered as degrading?

Nothing can be more false in argument, and more unreasonable, than to argue from the manners, customs, and sentiments of one period of society to those of another, and to attempt to account for any event at a remote period of the history of any people, by the sentiments and principles which actuate their posterity. If, during this, or any future period of our history, when a seat in parliament shall continue to be the highest object of desire, which either ambition, interest, or vanity can suggest, and when the right of voting for a member of parliament becomes an object proportionably great, any body or description of men, not prohibited by statute, should, for a long course of years, abstain, from exercising both or either of these rights, then it might be a reasonable conclusion to infer, that by some understanding, of which the origin and history was lost, they had relinquished the rights which they formerly enjoyed. But to infer that rights of a public nature have been abandoned by their possessors, or abrogated either by the express or tacit consent of the Legislature, merely because they had not been exercised for a period, during all of which there existed not a single motive to
exercise

exercise them, is a conclusion which reason can never make, and which neither law nor history can justify.

Having therefore endeavoured to shew, in the *first* place, that the right of the eldest sons of Peers to the privileges of other freeholders, is conferred upon them by all the statutes of election, in common with every other person possessing the legal qualification, and having also endeavoured to shew, that the right thus conferred upon them by statute, cannot, and ought not to be affected, either by the resolution of the House of Commons against their right, or by their own neglect of it, the complainer trusts to the judgment of your Lordships, to restore him to a privilege, to which, except himself and his brethren, the meanest of the people may successfully aspire. The wisdom and candour of the present generation has already done away one odious distinction under which the Peers themselves laboured; and while the acknowledged injustice which was done to them by the resolution of the House of Lords against the Duke of Hamilton, soon after the Union, ought to inspire your Lordships with great distrust of the resolution of the other House of Parliament in the case of the eldest sons of Peers, the liberality with which the House of Lords reversed their judgment, is a noble example for your conduct in the present cause, if your Lordships could be either encouraged or deterred by example in dispensing justice to the people. You have it in your power to do the complainer justice, and you must have the inclination; and as he hopes he has satisfied you, that you can exercise that power, and gratify your inclination, with strict conformity to the principles of the law, and of the constitution, he looks forward with pleasure, and with confidence, to your judgment in this cause, which, he hopes, will restore him, at no distant period, to the rights and privileges of a Freeholder of Scotland.

In respect whereof, &c.

CHARLES HOPE.

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